BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GAYLE W. JAMES Claimant VS.	)	
	)	Docket No. 165,727
VALASSIS COLOR GRAPHICS, INC. Respondent AND	)	
ITT HARTFORD Insurance Carrier AND	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

Respondent appeals from an Award entered by Special Administrative Law Judge William F. Morrissey on March 16, 1994. The Appeals Board heard oral argument on May 3, 1994.

APPEARANCES

Claimant appeared by his attorney, Thomas E. Hammond of Wichita, Kansas. Respondent and the insurance carrier appeared by their attorney, P. Kelly Donley, of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, James R. Roth of Wichita, Kansas.

RECORD

The Appeals Board reviewed and considered the record listed by the Special Administrative Law Judge in his Award of March 16, 1994. The Appeals Board also reviewed and considered the records of J. Mark Melhorn, M.D. and the report of John H.

Rempel, M.D., with the attached ERGOS Evaluation summary report, introduced by written stipulation.

STIPULATIONS

The Appeals Board adopts the stipulations identified by the Special Administrative Law Judge in the March 16, 1994, Award.

ISSUES

Respondent lists the following issues to be considered on appeal:

(1) Whether the decision is supported by the evidence;

(2) Whether the claimant met with personal injury by accident arising out of and in the course of his employment from January 1, 1991, through August 1991;

(3) The nature and extent of claimant's disability;

(4) Claimant's average weekly wage;

(5) Whether the respondent should have the benefit of the presumption of no work disability in K.S.A. 44-510e.

At the hearing on this appeal, respondent argued only nature and extent, including whether the presumption of no work disability should apply. The respondent did not stipulate, however, that claimant's injury arose out of and in the course of his employment during the alleged dates. The Appeals Board will, therefore, review the finding regarding arising out of and in the course of employment as well as nature and extent of the injury. The Special Administrative Law Judge found the average weekly wage to be $387.12, as respondent had argued in its letter submitting the case to the Administrative Law Judge for decision. Claimant did not argue for a different wage and the Appeals Board adopts the finding that the average weekly wage was $387.12.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments of the parties, the Appeals Board finds:

(1) Claimant did suffer personal injury by accident arising out of and in the course of his employment during the period January 1, 1991, to August 1991.

Claimant worked for respondent Valassis Color Graphics as an insert operator. The job involved feeding copy or advertisements into pockets and required repetitious grasping, pulling and pushing. Claimant testified that during the period January 1, 1991, through August 1991 his hands and arms began hurting all the time and became progressively worse. Claimant missed work because of the problems he was having until August 1991

when respondent finally terminated claimant's employment after claimant called in and reported he was having too much pain to work that day.

Respondent argues claimant suffered no additional permanent disability during the period alleged. Respondent rests this argument on testimony by Dr. Schlachter that he, Dr. Schlachter, would have recommended essentially the same work restrictions before January 1, 1991, as he recommended after claimant left work in August, 1991. The hypothetical work restrictions do not, however, tell the full story. Although Dr. Schlachter testified he would have recommended the same restrictions prior to January 1, 1991, he also testified claimant's permanent functional impairment increased from January 1, 1991, to August 1991. The Appeals Board finds that Dr. Schlachter's testimony, combined with claimant's testimony, establishes that claimant did experience accidental injury arising out of and in the course of his employment during the period alleged.

(2) The Appeals Board agrees with and affirms the decision of the Special Administrative Law Judge finding claimant has a forty-one percent (41%) permanent partial general disability.

Respondent argues the award should be for less than forty-one percent (41%) general disability. Specifically, respondent argues the award should be based on functional impairment only, that claimant is not entitled to work disability. Respondent relies on the presumption of no work disability created by K.S.A. 44-510e when the injured employee returns to work at a wage comparable to the pre-injury wage.

Respondent points to the ERGOS assessment which indicated claimant could have continued to perform duties of an insert operator. From this evidence, respondent argues the presumption of no work disability should apply and claimant should be limited to functional impairment. Evidence relating to ability to return to comparable wage work may be persuasive evidence of the nature and extent of claimant's disability. It may relate to either or both of the two prongs of the test for determining work disability, loss of labor market access and loss of ability to earn comparable wage. Such evidence may give rise to the statutory presumption that the employee suffered no work disability. See Foulk v. Colonial Terrace, ____ Kan. App. 2d ____, No. 71,139 (Dec. 1994).

In this case the evidence relating to claimant's ability or inability to return to work at a comparable wage comes from claimant's testimony, Dr. Schlachter's testimony, Dr. Melhorn's records, Dr. Rempel's May 3, 1993 note, and the ERGOS assessment. The ERGOS report, as respondent points out, indicates claimant can engage in light work for eight (8) hours per day and could perform the duties of an insert operator. Other evidence in the record, however, persuades the Appeals Board claimant could not perform the duties of this job. Claimant's testimony indicates he continued to do the job with pain until he missed so much work he was terminated. Dr. Melhorn released claimant to return to work with respondent but at the same time said if he does return to high intensity repetitive work the likelihood of increased symptoms would be greater and that he probably should return to less repetitive work. Dr. Schlachter recommended restrictions which would prohibit return to the repetitive work claimant had done for respondent. Taken as a whole, the Appeals Board believes the evidence indicates claimant's injury prevents him from performing the work he performed for respondent.

The Appeals Board also concludes claimant is entitled to benefits based upon a work disability. Work disability exists when the injury reduces the claimant's ability to

obtain employment in the open labor market and to earn a comparable wage. See Hughes v. Inland Container Corp., 247 Kan. 407, 422, 799 P.2d 1011 (1990). The medical evidence supports a finding that the injury reduced both claimant's ability to access the open labor market and his ability to earn a comparable wage. Dr. Schlachter diagnosed tendinitis of both upper extremities and rated claimant's functional impairment at six percent (6%) to the body as a whole. He recommended claimant avoid repetitive pushing, pulling, twisting or grasping motions with either arm or hand. He indicated claimant should not lift over twenty (20) pounds with either arm or hand and that he avoid vibratory tools and cold environments. The ERGOS assessment concluded claimant should be limited to the light category of work. Dr. Rempel rated claimant's functional impairment at eight percent (8%) of the body as a whole. Dr. Melhorn did not recommend restrictions but, as indicated, suggested claimant probably should return to less repetitive work.

Both parties presented expert testimony relating to the impact of the injury on claimant's access to the open labor market and ability to earn a comparable wage. Claimant offered the testimony of Jerry Hardin. Jerry Hardin testified the restrictions recommended by Dr. Schlachter would result in a seventy to seventy-five percent (70-75%) loss of access to the open labor market. He projected claimant would be able to earn $220.00 post injury. He compared the $220.00 to a pre-injury wage of $370.59 and arrived at a wage reduction of forty-one percent (41%).

Karen Terrill also concluded claimant would have a loss of access to the open labor market. From Dr. Schlachter's restrictions she concluded the loss would be thirty-three percent (33%) and from the restrictions indicated in the ERGOS report, the loss would be thirty-two percent (32%). From Dr. Melhorn's report she indicated there would be zero percent (0%) loss since he did not recommend restrictions. She projected a $320.00 post-injury wage which, compared to what she understood to be the pre-injury wage, resulted in a twenty percent (20%) wage loss.

Respondent argues the opinions regarding loss of access to the open labor market should be disregarded, again because Dr. Schlachter testified he would have recommended essentially the same work restrictions prior to January 1, 1991, as he recommended after the injury. The Appeals Board does not, under the circumstances of the instant case, consider it appropriate to subtract from claimant's loss on the basis of hypothetical pre-existing work restrictions which were never implemented or even recommended. The evidence indicates claimant sought medical attention for problems with his hands and arms as early as March 1990. In October 1990, he again sought medical attention. He was given splints to wear at work and was temporarily limited to light duty. Claimant was working for respondent at the time of both visits. He thereafter resumed his regular duties, his condition worsened and he was terminated. With this history, Dr. Schlachter testified that if claimant had started with respondent on January 1, 1991, and if he, Dr. Schlachter, had done a pre-employment physical shortly before claimant started work, he would have recommended work restrictions similar to those he recommended after August 1991. Claimant did not start on January 1, 1991, Dr. Schlachter did not do a pre-employment physical and neither Dr. Schlachter nor any other physician recommended permanent restrictions. The restrictions affected claimant's ability to earn a wage and obtain employment only after claimant's condition reached the point he could not successfully do the work for respondent. The hypothetical pre-existing restrictions should not be used to reduce the disability award.

Finally, respondent argues claimant's disability should be less because claimant is currently studying to become a teacher and once he completes his schooling and becomes certified, he will be able to earn a wage comparable to or greater than he was earning at the time of the accident. The Appeals Board does not consider it appropriate to base its decision on a possibility or potential so remote and uncertain. Claimant is enrolled but has not yet completed much of the course work.

The Appeals Board agrees with the assessment of disability made by the Special Administrative Law Judge. We consider it appropriate in this case to give equal weight to the testimony of the two labor market experts. In doing so, the Appeals Board uses seventy-two and one-half percent (72.5%) loss of labor market suggested by Mr. Hardin on the basis of Dr. Schlachter's restrictions and the thirty-two percent (32%) loss recommended by Karen Terrill on the basis of the ERGOS report as the high and low. By giving both equal weight as authorized in Locks v. Boeing Company, 19 Kan. App. 2d 17, 864 P.2d 738 (1993), the Appeals Board finds claimant has a fifty-two percent (52%) loss of access to the open labor market. The Appeals Board considers it appropriate to adjust the wage loss calculation by both experts to compare the projected post-injury wage to the stipulated pre-injury wage of $387.12. This adjustment gives a forty-three percent (43%) loss of ability to earn wages based on Jerry Hardin's testimony and a seventeen percent (17%) based on Karen Terrill's testimony. By giving these two opinions equal weight, the Appeals Board finds claimant has a thirty percent (30%) loss of ability to earn a comparable wage. When the loss of access and loss of wage factors are also given equal weight the result is a forty-one percent (41%) general body work disability which the Appeals Board finds to be claimant's disability.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey, dated March 16, 1994, should be, and hereby is, affirmed as follows:

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Gayle W. James, and against the respondent, Valassis Color Graphics, and the insurance carrier, ITT Hartford, and the Kansas Workers Compensation Fund for an accidental injury of August 1, 1991, and based on an average weekly wage of $387.12, for 415 weeks of compensation at the rate of $105.82 per week in the sum of $43,915.30 for 41% permanent partial general body work disability.

As of March 16, 1994, there was due and owing claimant 136.86 weeks of permanent partial compensation at the rate of $105.82 per week in the sum of $14,482.52.

The remaining 278.14 weeks are to be paid at the rate of $105.82 per week until fully paid or further order of the director.

Unauthorized medical expense of up to $350.00 is ordered paid to or on behalf of the claimant upon presentation of proof of such expense.

Claimant's attorney fee contract is hereby approved insofar as it is not inconsistent with K.S.A. 44-536.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed 80% to the respondent and 20% to the Kansas Workers Compensation Fund to be paid direct as follows:

William F. Morrissey	
Special Administrative Law Judge	$150.00
Barber & Associates	
Transcript of Regular Hearing	$420.60
Kelley, York & Associates	
Deposition of Ernest R. Schlachter, M.D.	$308.40
Deposition of Jerry D. Hardin	$285.00
Deposition Services	
Deposition of Karen Crist Terrill	$166.14

IT IS SO ORDERED.

Dated this ____ day of December, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: James R. Roth, Attorney at Law, Wichita, KS 67203
P. Kelly Donley, Attorney at Law, Wichita, KS 67202
Tom E. Hammond, Attorney at Law, Wichita, KS 67201
William F. Morrissey, Special Administrative Law Judge
George Gomez, Director